THE JUST WAR DOCTRINE AND STATE LIABILITY FOR PARAMILITARY WAR CRIMES

Alexander C. Linn*

TABLE OF CONTENTS

I. INTRODUCTION .................................. 621

II. JUS GENTIUM, NATURAL LAW, AND THE JUST WAR DOCTRINE .... 623
   A. Jus Gentium and Natural Law .......................... 623
   B. The Just War Doctrine ................................ 625
   C. Hugo Grotius and De Jure Belli ac Pacis ............. 632
   D. The Rise of Positivism and the Challenge of Nuremberg .... 635

III. LIABILITY FOR WAR CRIMES ......................... 638
   A. Nicaragua v. United States ............................ 639
   B. Prosecutor v. Tadic ................................... 642

IV. THE JUST WAR DOCTRINE, INTERNATIONAL LAW, AND
    STATE LIABILITY FOR WAR CRIMES ..................... 644
   A. State Control of Operatives and War Crimes Liability ..... 644
   B. The Just War Doctrine: Objections and Responses ........ 644
   C. The Just War Doctrine and War Crimes Liability ........... 647
      1. Conditions that Cause War Should Be
         Eliminated; and ................................... 647
      2. There is an Affirmative Obligation to Avoid War and
         Exhaust Peaceful Means of Resolving Conflict .......... 647
      3. States May Use Force to Protect the Innocent .......... 648
      4. States May Use Force in Self-defense .................. 651

* A.B., The University of California at Berkeley; J.D., The College of William and Mary; LL.M. Georgetown University. The author would like to thank Georgetown Professors Jonathan Drimmer and Mark Vlasic for their assistance with this project.
5. **Humane Treatment Must Be Extended to Non-combatants, Wounded Soldiers, and Prisoners; and** ........................................ 653

6. **Indiscriminate Destruction Is Prohibited** ..................... 653

V. **CONCLUSION** .................................................. 656
I. INTRODUCTION

The laws of war and armed conflict have been shaped by Christian theology. During the first centuries of Christian history, two changes impacted the Church and its views on war: the canonization of Scripture and the Christianization of the Roman Empire. By A.D. 397, the Church, at the Council of Carthage, completed its canonization of the Scriptures that comprise the Bible.\footnote{See Wayne Grudem, Systematic Theology: An Introduction to Biblical Doctrine 63-64 (1994).} It was and is a religious text that speaks of war, its rules, its sorrows, and its crimes.\footnote{See, e.g., Deuteronomy 20:10 (instructing the Israelites to first offer peace to a city before laying siege); Joshua 7:1-26 (stating that after David follows the Lord’s instructions and conquers Jericho, one of his soldiers, Achan, disobeys the prohibition against taking spoils from the city and is punished with death); Matthew 24:6-8 (“And ye shall hear of wars and rumours of wars...For nation shall rise against nation, and kingdom against kingdom...these are the beginning of sorrows.”).} The early Church was pacifist.\footnote{See Joachim von Elbe, The Evolution of the Concept of Just War in International Law, 33 AM. J. INT’L L. 665, 667 (1939) (noting that war was challenged by the early Church, which believed the conversion of the world would establish peace and that war was a consequence of original sin); John Keegan, War and Our World 39-40 (1998) (noting that early Christians viewed the New Testament as a pacifist text); Mark W. Janis, An Introduction to International Law 169 (3d ed. 1999) (“[T]he early Christians believed all wars immoral.”); Oxford Companion to American Military History 361 (John Whiteclay Chambers II et al. eds. 1999) [hereinafter Oxford] (noting that some Christians today still follow the Church’s early example of pacifism); D. Little, The ‘Just War’ Tradition, in The Hundred Percent Challenge: Building a National Institute of Peace (C. Smith ed., 1985), in John Norton Moore et al., National Security Law 57 (1990) [hereinafter Moore et al.] (noting also that some Christians today follow the early tradition of pacifism).} The Church, however, later looked to Scripture and found justifications for war. For example, in Exodus, Moses parts the sea and drowns Egyptian soldiers pursuing the Israelites to return them to slavery; the Israelites praise God for their deliverance by singing, “The LORD is a man of war: the LORD is his name.” In the gospels of the New Testament, it is a soldier who Christ singularly praises for having the greatest faith of Israel’s inhabitants.\footnote{Exodus 15:3.} St. John

\footnote{Luke 7:9. The Gospel of St. Matthew 8:5-10 states: And when Jesus was entered into Capernaum, there came unto him a centurion, beseeching him, And saying, Lord, my servant lieth at home sick of the palsy, grievously tormentedit. And Jesus saith unto him, I will come and heal him. The centurion answered and said, Lord, I am not worthy that thou shouldest come under my roof: but speak the word only, and my servant shall be healed. For I am a man under authority, having soldiers under me: and I}
the Baptist instructs soldiers to be content with their pay, suggesting Christians can accept war and military service. In the Epistles, St. Paul and St. Peter say that magistrates can use the sword against evil.

But war is also a curse and a cause of profound human suffering. Thus, it is not surprising that the early Church developed an elaborate system of rules to govern the ethics of warfare. The Church developed the Just War doctrine to establish the causes that justify war, *jus ad bellum*, and to restrain the use

say to this man, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it. When Jesus heard it, he marvelled, and said to them that followed, Verily I say unto you, I have not found so great faith, no, not in Israel.


For if the Christian religion condemned wars of every kind, the command given in the gospel to soldiers asking counsel as to salvation would rather be to cast away their arms, and withdraw themselves wholly from military service; whereas . . . the command to be content with their wages manifestly implies no prohibition to continue in the service.


7 See Romans 13:3-4 (“For rulers are not a terror to good works, but to . . . evil . . . he is the minister of God, a revenger to execute wrath upon him that doeth evil.”); 1 Peter 2:13-14 (“Submit yourselves to every ordinance of man for the Lord’s sake: whether it be to the king as supreme; Or unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well.”); LEWIS, supra note 6, at 87 (asserting that these verses, along with Christ’s praise of the soldier and St. John the Baptist’s instruction to soldiers, render Christian arguments for pacifism untenable).

8 See KEEGAN, supra note 3, at 1, 17-18 (noting that war entails profound suffering and that, unlike famine and pestilence, is a burden humanity has not escaped and inflicts on itself). Keegan wrote at the end of the twentieth century and notes, “War has been the scourge of this century. The ride of the other three horsemen of the Apocalypse, and particularly famine and pestilence, has been halted and even turned back during the last ninety years.” Id. at 1. Keegan’s reference to the Apocalypse stems from the Revelation of St. John the Divine, which describes four riders on four horses, thought to represent conquest, famine, war, and disease, that are unleashed on the world during the Great Tribulation that precedes Christ’s Second Coming. See Revelation 6:1-8. The rider on the red horse represents war. See id. at 6:4 (“And there went out another horse that was red: and power was given to him that sat thereon to take peace from the earth, and that they should kill one another: and there was given unto him a great sword.”).

9 See KEEGAN, supra note 3, at 40 (noting that the Church translated the Ten Commandments into an elaborate legal code, which applied to war); WEBSTER & COLE, supra note 6, at 73-77 (noting that by the fourth century A.D., Canon Law established that killing, normally unlawful, was permitted in war).
of violence within war, \textit{jus in bello}.\footnote{See \textit{Oxford}, \textit{supra} note 3, at 360.} Consequently, the Just War doctrine functions as a predicate to international law’s proscription of war crimes.\footnote{See id. (asserting that the Just War doctrine was the basis for medieval military codes, and regulated force in ways now set forth by the Geneva Conventions, Hague Rules, war crimes trials, and the U.N. Charter). A “war crime” is “conduct that violates international laws governing war.” \textit{Black’s Law Dictionary} 660 (pocket ed. 1996). Examples include the “killing of hostages, abuse of civilians in occupied territories, abuse of prisoners of war, and devastation not justified by military necessity.” \textit{id.}}

This Article analyzes the Just War doctrine and state liability for paramilitary war crimes. It concludes that the Just War doctrine is not a theological anachronism, but is instead reflected in modern international law governing war and armed conflict. It also concludes that current state practice is flawed by allowing a state to escape liability for an unorganized paramilitary group’s war crimes unless the state ordered or endorsed the group’s criminal conduct. Under the Just War doctrine and international law, a state is liable for war crimes committed by a paramilitary group it controls, regardless of whether the state ordered or endorsed the group’s criminal activity. Part II provides background information on the history of natural legal theory and the formation of the Just War doctrine. Part III reviews the post-World War II precedents that analyze state liability for war crimes. It establishes that, problematically, under recent precedent and state practice, a state bears liability for war crimes committed by an organized paramilitary group that it controls, regardless of whether the state ordered or endorsed the group’s criminal activity, but in contrast, the state bears liability for the war crimes committed by an unorganized paramilitary group only if it ordered or endorsed the criminal activity. Part IV analyzes the Just War doctrine and its parallels in international law. Part V concludes that, in contrast to current practice, under the Just War doctrine and international law, a state is liable for war crimes committed by both organized and unorganized paramilitary groups the state controls, regardless of whether the state ordered or endorsed the group’s criminal actions.

\section*{II. \textit{Jus Gentium}, \textit{Natural Law}, and the \textit{Just War Doctrine}}

\subsection*{A. Jus Gentium and \textit{Natural Law}}

By the second century A.D., Roman jurists had formulated \textit{jus gentium}, a universal law to accommodate the rights of foreigners in the Roman legal
Eventually, the distinction between foreigners and Romans was eradicated when the Emperor Caracalla established a single rule of law for all who lived under the Caesars. Jus gentium was thought to derive from natural reason, to be “observed by all mankind.”

In A.D. 312, Flavius Valerius Constantinus, Constantine the Great, and his legions defeated Marcus Aurelius Valerius Maxentius and his praetorian guard at the battle of Milvian Bridge on the Tiber River. Constantine had dreamed Christ would bring him victory under the sign of the cross. Constantine later converted from paganism to Christianity, and with his conversion came the conversion of the Empire. Constantine’s Edict of Milan secured religious freedom for Christians and, with freedom secured, Christianity flourished. The pre-Christian belief that jus gentium was a universal law based on natural reason carried over into the Church’s view of natural law.

12 See JANIS, supra note 3, at 1 (noting that jus gentium was “a universal law that could be applied by Roman courts to foreigners when the specific law of their own nation was unknown and when Roman law was inapposite”).

13 See generally MATTHEW BUNSON, A DICTIONARY OF THE ROMAN EMPIRE 209 (1991) (noting that Rome initially applied jus civile as Roman law and jus gentium as a law applied to foreigners, but that these systems blended and were eventually rendered redundant when the Emperor Caracalla passed the Consitutio Antoniniana, which made all inhabitants of the Empire citizens, and thereafter, “there would be one law for all people”).


16 CROCKER, supra note 15, at 3 (noting that Constantine and his men made signs of the cross on their shields and helmets).

17 BUNSON, supra note 13, at 108; see also CROCKER, supra note 15, at 4-5.

18 See BUNSON, supra note 13, at 276; CROCKER, supra note 15, at 4-5.

19 See generally CATECHISM OF THE CATHOLIC CHURCH 475 (United States Catholic Conference, 2d ed. 1997) (“The natural law, present in the heart of each man and established by reason, is universal in its precepts and its authority extends to all men. It expresses the dignity of the person and determines the basis for his fundamental rights and duties . . . “); see also JOHN A. HARDON, S.J., THE CATHOLIC CATECHISM 374 (1981) (describing the Church’s authority to teach natural law).
B. The Just War Doctrine

The Church’s view of natural law impacted its views on war, though restraints on war preceded Christianity. Pre- and non-Christian societies had envisioned *jus ad bellum*, rules to guide when a war might justly be initiated. For example, the Romans held a bifurcated view of war: at the general level, they accepted war as part of *ratio naturalis*, the natural world order, dictated by laws of nature men could not alter; yet a specific impetus to war could only be justified by an injury accompanied by a lack of atonement by the wrongdoer. Pre- and non-Christian societies also envisioned *jus in bello*, rules to limit the horrors of war, for ethical, religious, or utilitarian reasons.

20 See JANIS, supra note 3, at 168 (“States have long employed law to limit their conflicts. The idea that wars should be subject to legal rules dates back at least to the ancient civilizations of India, China, Israel, Greece, and Rome.”).

21 Id. at 168-69; see also BERNARD BRODIE, WAR AND POLITICS 232 (1973) (noting that Greece and Rome had stark views of war, and the Romans developed “fetial law, which demanded that war could be fought only for *res repetitae*, that is, to obtain compensation for wrongs suffered”); von Elbe, supra note 3, at 666 (describing fetial law). von Elbe states: The fetial procedure originated in the belief – common to all peoples of antiquity and even traceable to modern times – that battles are decided by providential interference and that victory is a gift of the gods who thereby legitimatize the conquests made in war. Hence scrupulous precautions were taken to assure beyond doubt that a war was agreeable to the deity. A war commenced in accordance with the rules of the fetial proceedings was “justum,” which means legally correct, and at the same time “pium,” viz., sanctioned by religion and, consequently, could be expected to receive divine blessings. Id. at 666-67 (citations omitted). On this point, note that the Church of England’s Book of Common Prayer includes prayers for sailors recognizing naval victories come from God. *Forms of Prayer to be Used at Sea, After Victory or Deliverance from an Enemy*, in THE BOOK OF COMMON PRAYER 550, 551-52 (ca. 1662):

O Almighty God, the Sovereign Commander of all the world, in whose hand is power and might which none is able to withstand: We bless and magnify thy great and glorious Name for this happy Victory, the whole glory whereof we do ascribe to thee, who art the only giver of Victory.

22 von Elbe, supra note 3, at 666.


As long as man has fought in wars, however, rules to reduce the suffering to both the environment and to other humans have existed . . . provisions in the modern law of war are derived directly from some of the earliest formulations.
But Constantine’s Christianization of the Empire merged the authority of church and state, creating the Civitas Dei, the City of God, in which God ordained wars against evil. Thus, by the fifth century A.D., the Church’s pacifist disposition was displaced by St. Augustine’s views on natural law, which established that under certain conditions, war was just, even obligatory.

St. Augustine concluded that “natural law” was man’s intellectual grasp of God’s eternal law, and justice was “not the product of man’s personal opinion, but something implanted by a certain innate power.” As to war, St. Augustine stated:

of rules regulating warfare. For example, in the book of Deuteronomy, the ancient Hebrews were given specific instructions on the protections that were to be afforded to the persons or property of an enemy city under siege.

Id. Addicott and Hudson assert armies utilized laws of war for several reasons: (1) to limit reciprocal war crimes by the enemy; (2) to prohibit the spoil of enemy property that was tribute for the conqueror; (3) out of recognition that abuses “seldom shorten the length of conflict and are never beneficial in facilitating the restoration of peace”; (4) to avoid the wasteful use of limited military resources; and (5) in the democratic era, to abide by fundamental human rights and the rule of law. Id. at 177-79.

24 See von Elbe, supra note 3, at 668 (describing the view of Christian Rome and noting it contemplated that “wars that must be suffered because they are ordained by Providence are to be distinguished from those which, lacking that character, are to be avoided”).

25 See, e.g., Yoram Dinstein, War, Aggression and Self-Defence 60 (3d ed. 2001) (“St[.] Augustine enunciated the fundamental principle that every war was a lamentable phenomenon, but that the wrong suffered at the hands of the adversary imposed ‘the necessity of waging just wars.’”).

Scholars are skeptical about the motives that compelled the Church to abandon pacifism. Dinstein notes:

As long as the Roman emperors were pagans, the Church upheld a pacifistic posture, and even forbade Christians to enlist as soldiers. But after Christianity had become the official religion of the empire in the days of Constantine, the Church was compelled to alter its view about war: from that point onwards, Christians were expected to shed their blood for the empire.

Id. (citations omitted). Brodie asserts, “Naturally, the question whether or not wars were just was easy to answer when the enemy were pagans and later heretics, and from the seventh century onward there was an expanding need for armed defense against Islam.” Brodie, supra note 21, at 233-34.

Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further that kind of war is undoubtedly just which God Himself ordains.27

St. Augustine also concluded, "[P]eace is war's purpose, the scope of all military discipline, and the limit at which all just contentions aim."28

The bonds uniting Christian theology to just war deepened with medieval scholasticism. In the thirteenth century A.D., St. Thomas Aquinas, a Dominican monk, building on St. Augustine's ideas, offered his vision of natural law and just war.29 St. Aquinas concluded three things were necessary for a just war: (1) auctoritas principis, only a sovereign ruler, not a private person, has the authority to declare war because only a ruler is entrusted with the welfare of his people; (2) causa justa, the cause for war must be just, it must be based on some fault, avenge a wrong, or restore what has been seized unjustly; and (3) intentio recta, the belligerents must have a rightful intention to advance good and to avoid evil.30

Critically, the Church's formation of the Just War doctrine, later embraced by leaders of the Protestant Reformation, established that war might not simply be permissible under natural law, but could in fact be a Christian obligation, since Christians were obliged to protect the innocent and oppose evil.31 But

---

27 JANIS, supra note 3, at 169 (quoting St. Augustine) (citation omitted).
29 See generally St. Thomas Aquinas, Summa Theologica, in BASIC TEXTS, supra note 28, at 31; see also DINSTEIN, supra note 25, at 60; STUMPF, supra note 26, at 183-84.
30 St. Thomas Aquinas, Summa Theologica, in BASIC TEXTS, supra note 28, at 31; DINSTEIN, supra note 25, at 60; see also James Turner Johnson, Just War, As It Was and Is, FIRST THINGS 14, 17 (Jan. 2005) (asserting that St. Aquinas recognized two just causes for bellum, "recovery of that which has been wrongly taken, and punishment of evil"). Johnson asserts punishment of evil extended to defense, since a state's leaders bear "responsibility for the good of the political community." Johnson notes, "Bellum in medieval usage referred to any use of armed force by a sovereign ruler, whether this force was applied internally to that ruler's society or externally." Id. at 16.
31 See Darrell Cole, Good Wars, FIRST THINGS 29-31 (Oct. 2001) (noting that St. Aquinas, and later John Calvin, articulated a Christian doctrine of just war as a basis for protecting the innocent and redressing wrongs). Professor Cole asserts:
The most noteworthy aspect of the moral approach to warfare in [St.] Aquinas and [John] Calvin is that it teaches – contrary to today's prevailing views –
the Christian duty to wage just wars also entailed acting with restraint, and consequently, it was a duty subject to the Church's regulation.\textsuperscript{32} The \textit{Pax Ecclesiae} flourished from A.D. 1000 to 1300, and through it, the Church attempted, with limited success, to limit domestic and international wars, prohibit fighting on certain days, and declare times of temporary peace in order to grant warring populations a respite from constant fear of attack.\textsuperscript{33} Thus, under the Just War doctrine, a Christian's religious duty might compel him to take up arms against an enemy when the cause was just.\textsuperscript{34} He must not act out

\begin{itemize}
\item that a failure to engage in a just war is a failure of virtue, a failure to act well.
\item An odd corollary of this conclusion is that it is a greater evil for Christians to fail to wage a just war than it is for unbelievers. When an unbeliever fails to go to war, the cause may be a lack of courage, prudence, or justice. He may be a coward or simply indifferent to evil. These are failures of natural moral virtue. When Christians (at least in the tradition of Aquinas and Calvin) fail to engage in just war, it may involve all of these natural failures as well, but it will also, and more significantly, involve a failure of charity. The Christian who fails to use force to aid his neighbor when prudence dictates that force is the best way to render that aid is an uncharitable Christian. Hence, Christians who willingly and knowingly refuse to engage in a just war do a vicious thing: they fail to show love toward their neighbor as well as toward God.
\end{itemize}

\textit{Id.} at 31. \textit{See also} WEBSTER \& COLE, \textit{supra} note 6, at 138 (noting that in St. Aquinas's view, "Peace can be both pleasing to God (a just peace) or displeasing to God (an unjust peace)," and that "[j]ust citizens should keep the peace and fight in just wars (when necessary) because these are meritorious acts of charity"). Webster and Cole also assert that under John Calvin's view, "The soldier who fights justly is an agent of God's vengeance—not of his own vengeance. Just soldiers fight in order to execute God's wrath, which is in harmony with his love, and that is exactly what they do when they fight justly in a just war." \textit{Id.} at 159.

\textsuperscript{32} \textit{See} BRODIE, \textit{supra} note 21, at 234 (noting that the Church advanced the doctrine of \textit{humana civilitas}, the unity of mankind, and developed the "Truce of God" to regulate Christians at war).

\textsuperscript{33} \textit{Id.;} JANIS, \textit{supra} note 3, at 169. It is important not to overstate the Church's ability to govern disputes and limit the impetus to war. von Elbe, after discussing St. Aquinas's influence on the Just War doctrine, notes:

\begin{quote}
The idea of the \textit{Respublica Christiania} had ceased to be effective as a political reality when most of the scholastic treatises on the war problem were written. The general trend of medieval society was towards the disintegration of unity and the establishment of independent political entities rather than the development of a unitary system.
\end{quote}

depicted in von Elbe, \textit{supra} note 3, at 670 (citation omitted).

\textsuperscript{34} Critics have recognized the Christian call to arms could be abused. \textit{See, e.g.,} BRODIE, \textit{supra} note 21, at 234. Brodie notes, "By the time we enter the Renaissance the popes themselves had become warrior princes, seen as often abroad as soldiers in armor as in their white robes." \textit{Id.} He then notes the Catholic Humanist Desiderius Erasmus, in \textit{Encomium moriae} (PRAISE OF
of vengeance, and even if victorious, obedience to Christ might also demand he offer penance for killing.35

These views of just war, with origins in the Catholic vision of natural law, heavily influenced the early sixteenth century formation of international law set forth by two Spanish clerics of the Catholic Church, Francisco Suárez and Franciscus de Victoria, both of whom addressed the lawfulness of a state’s use

FOLLY, ca. 1509), ridiculed the warrior pope Julius II. Id. at 234-35. Erasmus saw Julius II could devise “a way whereby it is possible for a man to whip out his sword, stick it into the guts of his brother, and nonetheless dwell in that supreme charity which, according to Christ’s precept, a Christian owes to his neighbor.” Id. at 235 (quoting PRAISE OF FOLLY 101 (H.H. Hudson trans., Princeton University Press 1941)).

35 See, e.g., KEEGAN, supra note 3, at 40 (noting that Norman knights were required to do forty days’ penance for wounding a fellow Christian, and to avoid war “during the Christian year’s penitential seasons, Advent and Lent”). Keegan also notes, “Islam went further. The [Prophet Mohammed’s] prohibition of fighting between Muslims was taken so seriously by the devout that, during the civil wars of the early Caliphate, contestants recruited armies of infidel slaves to do the fighting on their behalf.” Id. The penance required of Normans was extensive:

1. Anyone who knows that he killed a man in the great battle must do penance for one year for each man that he killed.
2. Anyone who wounded a man, and does not know whether he killed him or not, must do penance for forty days for each man he thus struck (if he can remember the number), either continuously or at intervals.
3. Anyone who does not know the number of those he wounded or killed must, at the discretion of the bishop, do penance for one day in each week for the remainder of his life; or, if he can, let him redeem his sin by a perpetual alms, either by building or endowing a church.
4. The clerks who fought, or who were armed for fighting, must do penance as if they had committed these sins in their own country, for they are forbidden by the canons to do battle.
5. Those who fought merely for gain are to know that they owe penance as for homicide [i.e., seven years].
6. Those who fought as in a public war [i.e., out of a concern for justice] have been allotted a penance of three years by their bishops out of mercy.
7. The archers who killed some and wounded others, but are necessarily ignorant as to how many, must do penance as for three Lents.

WEBSTER & COLE, supra note 6, at 195-96 (citation omitted) (noting also that William the Conqueror’s knights were required to do penance even though they had “fought justly in a just war”).
of force. Suárez, a Jesuit, held a broad view and concluded that a "'grave injury to one's reputation or honour' was a just cause of war."  

Victoria, a Dominican, analyzed the right of states to use force, specifically, the right of Spain to use force against Native Americans in North America. Victoria rejected the notion that wars could be freely waged against the Native Americans simply because they were pagan and concluded Spain could only use force against them if it had a just cause. Victoria ultimately concluded the use of force against Native Americans was justified because they violated the Spaniards' fundamental rights by prohibiting their ability to travel freely, engage in trade, and bring voluntary converts to the Christian faith.  

Additionally, Victoria recognized that when two states go to war, both of them may conclude that their use of force is justified. He theorized that although only one state is objectively right in its conclusion, the second state, which is using force unjustly, may nevertheless be acting in good faith under a fog of subjectivity and "invincible ignorance" that prevents it from seeing the error of its use of force. In the medieval era, this problem could be partially mitigated by the Church. If the Church applied the Just War doctrine to a given conflict and offered a conclusion on the actions of the states involved, its conclusion was authoritative. But this faced limits. The Church's

36 See Alfred Verdross & Heribert Franz Koeck, Natural Law: The Tradition of Universal Reason and Authority, in The Structure and Process of International Law 17, 19-20 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983) (noting that Suárez (1548-1617) distinguished between law as either "internal law common to different nations" or "international law properly so called," and that Victoria (1483-1546) formulated a concept of international law that was binding on all nations of humanity); see also Janis, supra note 3, at 60 ("The early sixteenth- and seventeenth-century Spanish international lawyers, Vitoria and Suárez, for example, based the law of nations on Catholic natural law foundations." (citation omitted)).  
37 Dinstein, supra note 25, at 61 (quoting Francisco Suárez, Selections from Three Works, De Triplici Virtute Theologia: Charitate (Disputation XIII, § IV, 3), in 2 Classics of International Law 817 (G.L. Williams et al. trans., 1944)).  
38 Id. (quoting Franciscus de Victoria, De Indis et de Jure Belli Relectiones, in Classics of International Law 125 (John Pawley ed., trans., 1917) (1696)).  
39 Id. (quoting Victoria, supra note 38, at 151-58).  
40 Id.  
41 Id. (quoting Victoria, supra note 38, at 177): Assuming a demonstrable ignorance either of fact or of law, it may be that on the side where true justice is the war is just of itself, while on the other side the war is just in the sense of being excused from sin by reason of good faith, because invincible ignorance is a complete excuse.  
42 Dinstein, supra note 25, at 62 ("For the medieval theologians and canonists, any dispute as to the interpretation or application of the just war doctrine (or any other doctrine) could be
decisions about the use of force were not universally accepted. For example, the Vatican supported Charles V and his vision of a Holy Roman Empire that could stand united against the Turks. Charles V's claim to a world empire rang hollow in Spain, and Victoria rejected as pretextual Charles V's claims to just causes that supported his conquests. Here, the Dominican Victoria's normative vision of international law appears to meet the realpolitique of the sixteenth century Europe: Victoria recognized sovereigns were central to the international legal system.

The Church's influence would face an even greater challenge. Western European Christendom stood on the brink of civil war. Martin Luther, an Augustinian monk, challenged the Church's views, and more importantly, its authority over believers. The Protestant Reformation ended the notion that the Church could act as a universally accepted authority to assess and restrain Christian warfare. The resulting Wars of Religion were horrific in their human toll and gave stark witness to the eradication of restraint. Protestants

resolved authoritatively by the Catholic Church.

43 See Yoram Dinstein, Comments on War, 27 HARV. J.L. & PUB. POL'Y 877, 877-88 (2004): Even in its heyday, the "just war" doctrine was mostly a convenient tool or fig-leaf, and States went to war whenever they deemed fit, using or abusing an arbitrary list of "just causes." There is no indication whatever that the "just war" doctrine affected the practice of States by limiting in a perceptible manner their freedom to go to war.

Id.

44 See CROCKER, supra note 15, at 231 (noting that, as to Charles V, "the [P]apacy feared his strength, while it relied on his muscle").

45 von Elbe, supra note 3, at 674.

46 Id. Sovereignty was central to St. Aquinas's views on just war, since under auctoritas principis, only a sovereign ruler, not a private person, has the authority to declare war because only a ruler is entrusted with the welfare of his people. See supra note 30 and accompanying text.

47 See CROCKER, supra note 15, at 242-46 (asserting that Luther concluded the Catholic Church's Pope was the Antichrist, rejected the Catholic tradition of natural law, and rejected the need for an educated priesthood; for these and other views, Charles V denounced him at the Diet of Worms).

48 See Little, in MOORE ET AL., supra note 3, at 57 (asserting that the Reformation and the rise of the nation state ended the power of the Church).

49 See CROCKER, supra note 15, at 249 (noting that from 1523 to 1527 during the Wars of Religion, 250,000 peasants died in Germany and 50,000 were rendered refugees); KEEGAN, supra note 3, at 41 ("The outcome... [of] the Thirty Years War, the worst thus far in European history, ... may have killed a third of the German-speaking peoples and left Central Europe devastated for much of the seventeenth century."). Crocker asserts that because of Luther:

The great medieval achievement of Christendom—of curbing and redirecting the martial spirit of barbarian Europe by transforming the Gothic warrior into
accepted the Just War doctrine, but they rejected the Catholic Church's authority to apply it. After the Reformation, the Just War doctrine could only be useful if it was revised and linked to a new source of authority—one that was universally accepted throughout Western Christendom. The Just War doctrine's revision would come from a Dutch Protestant.

C. Hugo Grotius and De Jure Belli ac Pacis

In the seventeenth century, Huig van Groot (Latinized as "Hugo Grotius"), a Protestant imprisoned for rejecting Calvinism—embraced Victoria's ideas and extended them into a resolutely state-centric framework to assess the legality of war. In 1625, Grotius published De Jure Belli ac Pacis (The Law

the Frankish knight, subordinating him to unarmed priests, and making him kneel before the bearer of the cross—was undone. If Luther had been in New Spain, he would have told the Conquistadors to put the priests in their place, because the authority of the state was founded in Scripture while the authority of the pope and the clergy was not.

CROCKER, supra note 15, at 243. Crocker's statement suggests that during the medieval era, canon law was critical to restraining soldiers in war. Keegan suggests that during World War I, the same result was achieved through cultural and military norms:

[T]he armies of the Great War did not commit atrocities, either against each other or against civilians. They did not rape, nor loot, nor mistreat wounded or prisoners, nor behave in any way at all as both the Catholic and Protestant armies had done in Germany during the Thirty Years War.

KEEGAN, supra note 3, at 53-54. Keegan further notes the soldiers of the Great War were:

[S]uffused with the idea of fair play, the honour of the school, doing the decent thing and standing up for the weak and the weaker sex. The regular officers who commanded them had no need to teach the code of honour they had learnt at their public schools and at Woolwich and Sandhurst. It was already implanted in the volunteers' breasts. Equivalent codes possessed the armies of France, Germany, Austria-Hungary and Russia, even if in a more institutionally religious than secular form. It was the idea of honour, and its associated ideals of duty and self-sacrifice, that supplied the energy of the First World War.

KEEGAN, supra note 3, at 54-55.

50 See THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 81 (Clarence Morris ed., 1959) [hereinafter THE GREAT LEGAL PHILOSOPHERS] (noting that Grotius was imprisoned for his connection to the Arminians, who struggled for political and religious power with the Calvinists). For an explanation of the conflict between Calvinists and Arminians, see HALLEY'S BIBLE HANDBOOK WITH THE NEW INTERNATIONAL VERSION 995 (2000), which states:

An attempt to modify Calvinism occurred in the Netherlands in 1618-1619 at the Synod of Dort. Jacobus Arminius believed that people could resist the
of War and Peace), ostensibly to vest remedial boundaries on the conduct of states at war.\textsuperscript{51} If the Just War doctrine found favor within Catholic and Protestant scholasticism, it appears not to have flourished on battlefields. Grotius stated:

Throughout the Christian world I have seen a lawlessness in warfare that even barbarian races would think shameful. On trifling pretexts, or none at all, men rush to arms, and when once arms are taken up, all respect for law, whether human or divine, is lost, as though by some edict a fury had been let loose to commit every crime.\textsuperscript{52}

Grotius’s thought was similar to his predecessors in its substance.\textsuperscript{53} He accepted Victoria’s idea that two states might both feel justified in their use of force and that although only one’s view was accurate, the second state could

grace of God, whereas Calvin had believed God’s grace to be irresistible and that believers could not fall away from salvation. The Calvinists won, asserting that once one is saved from sin, one is always secure with God; they began to persecute Arminians.

See also KEEGAN, supra note 3, at 41 (discussing the rise of sovereign authority after the Protestant Reformation). Keegan asserts:

Those awful results of the collapse of universal and superordinate authority provoked the search for an alternative legal basis on which relationships between the states could be established. It was found by a new profession of international jurists, who proposed that, since states could no longer agree on where higher sovereignty lay, they should each become sovereign themselves. As sovereignties, they would exist as independent moral entities, perhaps better amoral entities, each judging how it should behave, exclusively in terms of its own interests.

Id. The state-centric vision of society was also developing in England. In the seventeenth century, Thomas Hobbes, an English classicist, published the Leviathan, which provided justification for the dissolution of traditional loyalties to Church, King, guild, city, baron, and empire and replaced these loyalties with a single loyalty to the sovereign state, an international actor “to which all loyalty was due internally and which was unrestrained externally.” JANIS, supra note 3, at 161.


\textsuperscript{53} See von Elbe, supra note 3, at 678 (noting Grotius adopted the traditional Just War doctrine “more or less unchanged from his predecessors”).
Nevertheless be acting in good faith but still ignorant of its error—Victoria's veil of "invincible ignorance."54 He also envisioned that a just war could only be fought on narrow grounds: "(1) [in] self-defence; (2) to enforce rights; (3) to seek reparations for injury; and (4) to punish a wrong-doer."55 Additionally, Grotius concluded that if there was any doubt about the causes of war, force must be foresworn.56

But Grotius also differed from St. Augustine and St. Aquinas. If Constantine's victory under the cross allowed the Church to Christianize natural law, the Wars of Religion abolished the Church's hegemony in Europe, and this compelled Grotius to distinguish between three legal frameworks: (1) the law of nations, which was based on sovereignty; (2) natural law, which was based on reason; and (3) Christian moral law, which was based on the New Testament.57 Thus, Grotius's arguments for restraint in war were not like those

54 See DINSTEIN, supra note 25, at 62 (asserting that Grotius adopted Victoria's view of invincible ignorance); GROTIUS, supra note 52, at 253-54, Book 2, Ch. 23, § 13:
[A] war cannot be just on both sides, any more than a lawsuit can be. For, by the very nature of the case, there can be no moral sanction given us to do opposite things, such as acting and preventing action. Yet it may indeed happen that neither of the warring parties is acting unjustly. For no one is acting unjustly unless he knows that he is doing an unjust thing, and there are many who do not know it.

56 See GROTIUS, supra note 52, at 254, Book 2, Ch. 23, § 13:
But in a case of war it is hardly possible that recklessness and a failure in charity should not make their appearance because of the gravity of the issues involved. They are certainly so grave as to require more than plausible reasons for the war. The reasons should be evident to everybody.

See also Little, supra note 3, at 55.
57 See JANIS, supra note 3, at 162-67. Grotius wrote:
Now just as there are laws in each state that aim at securing some advantage for that state, so between all or most states some laws could be and indeed have been established by common consent, which look to the advantage not of single communities but of the whole great concourse of states. And this is the law we call the law of nations, whenever we distinguish it from natural law.

There are persons who imagine that all laws lose their authority in wartime, but such a theory we should never accept. Rather, we should declare it wrong to begin a war except for the enforcement of justice, and wrong to continue a war already begun, unless it is kept within the bounds of justice and good faith . . . .

Laws may be silenced by the clash of arms, but only those laws of the state
of St. Augustine and St. Aquinas in that Grotius did not limit himself to theological justifications for limiting war; his ideas are an extension of Victoria's in that he focused on sovereigns and their obligations in the community of sovereigns. Grotius's emphasis on sovereignty and natural law divided international law into positivists and naturalists. The positivists prevailed, though post-Grotian views on just war solidified additional precepts of the Just War doctrine. These included: (1) prohibiting the targeting of noncombatants while allowing military targets that might result in unintentional collateral damage; (2) concern over the use of indiscriminate weapons and their impact on noncombatants; and (3) concern for the treatment of prisoners.

D. The Rise of Positivism and the Challenge of Nuremberg

More than a century after Grotius, William Blackstone and Jeremey Bentham each brought his philosophical worldview to delineate the rules governing relations between states. Blackstone, like Roman jurists and Grotius, saw "the law of nations" as a construct of natural reason. Bentham expanded on the preexisting concept of "the law of nations" and developed a

that have to do with courts and peacetime affairs; not those other laws that are permanent and applicable at all times. . . .

58 See INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 36 (Robert J. Beck et al. eds., 1996) [hereinafter INTERNATIONAL RULES] ("Grotius was eclectic in his use of scriptural, naturalist, and positive sources of deriving legal principles, and has been revered by some commentators for extricating law from theology and from 'vague' natural law tenets."). Beck and his colleagues note:

Grotius often speaks of the law of nature and the law of nations as if the two impose identical obligations on states – as if, notwithstanding their different sources, the law of nature and the law of nations speak to states with one voice. Like other natural lawyers, Grotius values reason or "well-tempered judgement" as a tool for discerning the content of the law from the nature of things. This eclectic Naturalism proved difficult for others to maintain, however, and after Grotius the study of international law became more conspicuously divided between Naturalists and Legal Positivists.

59 See id.

60 See Little, in MOORE ET AL., supra note 3, at 55-56.

61 JANIS, supra note 3, at 235-36 (describing the history of international law during the Enlightenment).
new concept of "international law." Bentham was not overly generous in his construction of international law. In Bentham's view, international law was derived from natural law, which he rejected as amorphous. However, his philosophical mandate for utility had international consequences. Bentham acknowledged that moral sanctions might enforce international law. Furthermore, international law might enhance utility.

By the early nineteenth century, the Napoleonic wars, like the Wars of Religion, revealed that the Just War doctrine and international law's restraints on war did not always find favor on battlefields. Carl Von Clausewitz, a Prussian commander and Western Civilization's most famous military theorist, dismissed international law's restraints on war. He stated, "War is thus an act of force to compel our enemy to do our will . . . Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it." More skepticism came from academia. At the University of London, John Austin, a former military officer, initiated a career as a legal scholar. Austin's views on law were state-centric and prioritized the sovereign above all other structures of obligation. Austin acknowledged God made rules that .

---

63 See id. at 407 ("Bentham therefore did not think that there was much to the law of nations except natural law and agreements, both of which were of doubtful legal content.").
64 Id. at 412 (noting that Bentham believed religious sanctions could facilitate utility).
65 Id. at 413 ("Thus, the utilitarian objects of international law were simply those of municipal law writ large: 'the end that a disinterested legislator upon international law would propose to himself, would therefore be the greatest happiness of all nations taken together.' ") (citation omitted).
66 CARL VON CLAUSEWITZ, ON WAR 83 (Michael Howard & Peter Paret eds., 1993) (emphasis in original). Clausewitz also believed unmitigated force was tenable in war; only efficiency served as a restraint:

If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct . . . [W]ar is an act of force, and there is no logical limit to the application of that force. Each side, therefore, compels its opponent to follow suit; a reciprocal action is started which must lead, in theory, to extremes.

Id. at 85.
67 See generally THE GREAT LEGAL PHILOSOPHERS, supra note 50, at 335-36 (providing biographical information on Austin).
68 See JANIS, supra note 3, at 242:

John Austin, the leading nineteenth-century English legal positivist,
THE JUST WAR DOCTRINE AND STATE LIABILITY

governed man, but saw formal jurisprudence as something distinct, which focused on positive law, legal commands given by political superiors to their inferiors. To Austin, since sovereigns were equal in their sovereignty, international rules between sovereigns could be dismissed as advisory rather than true obligations. Austin's positivism was the dominant jurisprudential view until the Allied Powers won World War II and concluded at the Nuremberg trial that men, not states, were responsible for abiding by the laws of war. Nuremberg's new vision of international legal obligation validated

hammered the nail in the theoretical coffin when he wrote that because international law claimed to regulate matters between sovereign states and because sovereigns by his definition could not be regulated by any outside authority, international law was only a form of "positive morality" and not really "law" at all.


Laws set by men to men are of two leading or principal classes . . . .

Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies . . . .

Though some of the laws or rules, which are set by men to men, are established by political superiors, others are not established by political superiors, or are not established by political superiors, in that capacity or character.

Closely analogous to human laws of this second class, are a set of objects frequently but improperly termed laws, being rules set and enforced by mere opinion . . . .

70 See John Austin, Lectures on Jurisprudence, The Province of Jurisprudence Determined, Lecture V, in THE GREAT LEGAL PHILOSOPHERS, supra note 50, at 351:

Since no supreme government is in a state of subjection to another, an imperative law set by a sovereign to a sovereign is not set by its author in the character of political superior . . . . an imperative law set by a sovereign to a sovereign is not a positive law or a law strictly so called.

JANIS, supra note 3, at 2:

Even international law's most famous jurisprudential critic, John Austin, acknowledged in 1832 that international legal rules were effective. At the same time, however, he argued that, because there was no international sovereign to enforce it, international law could not be the same sort of positive law as that enacted by sovereign states for internal application.

71 See JANIS, supra note 3, at 253:

The prevalent philosophy of international law in the nineteenth and early twentieth centuries, legal positivism, maintained that international law was a
a three part charge against the Nazi leadership: (1) crimes against peace, a 
charge that focused on the violation of international peace treaties; (2) war 
crimes, a charge that focused on customs of war; and (3) crimes against 
humanity, a charge that focused on inhumane acts committed against civilian 
populations. The charge of committing crimes against humanity was brought 
without regard to whether such crimes were a violation of the national 
domestic law. Thus, individuals acting under sovereign authority were 
deemed to have violated international legal obligations that overrode sovereign 
commands.

III. LIABILITY FOR WAR CRIMES

Nuremberg squarely established that states, and their political and military 
leaders, were liable for the illegal waging of aggressive wars and for the 
atrocities that occur during those wars. Although Nuremberg derogated from 
the dominant positivist worldview that preceded World War II, it nevertheless 
fit squarely into the early Roman and medieval Christian formation of the Just 
War doctrine, which limits both the grounds on which states may wage war 
and the soldier’s conduct within war. This call for limits on state aggression 
and military conduct has compelled scholars and tribunals to analyze when 
states and military officers bear responsibility for a wrongful initiation of force 
and for the war crimes committed by the combatants that states command, 
instruct, or fund. Modern approaches to state liability for combatants’ war 

72 Id. at 254.
73 Id.
74 See Henry T. King, Jr., Address, Nuremberg and Sovereignty, 28 CASE W. RES. J. INT’L 
L. 135, 137 (1996) ("Nuremberg . . . held that individuals have obligations under international 
law which are over and above the obligations to the sovereign state of Germany.").
75 See generally Maj. William H. Parks, Command Responsibility for War Crimes, 62 MIL. 
L. REV. 1, 3-4 (1973) (noting that Sun Tzu assessed the responsibility of generals and officers 
for soldiers’ actions, and Grotius assessed when a community and its rulers could be held 
responsible for a subject’s crimes). For example, in 1689, during the English Revolution, a 
commander loyal to the Crown, Count Rosen, was relieved of command and exiled by James II 
for murdering innocent noncombatants as part of an unsuccessful siege against Calvinist 
Londonderry. See id. at 5. In 1647, the Holy Roman Empire conducted a war crimes trial and 
held the defendant’s claim of superior orders was contrary to the law of God. MOORE ET AL., 
 supra note 3, at 364 n.31 (citing G. SCHWARZENBERGER, II INTERNATIONAL LAW, 
INTERNATIONAL COURTS 462-66 (1968)). In 1816, Justice Joseph Story held that orders to kill
crimes are set forth in two post-World War II cases: (1) *Nicaragua v. United States*, which links liability to control over combatants, and (2) *Prosecutor v. Tadic*, which modifies this framework and suggests states can escape liability for a subset of combatants they control.

### A. Nicaragua v. United States

In 1986, the International Court of Justice (ICJ) issued its ruling in *Nicaragua v. United States*. Nicaragua alleged that the United States violated international law by providing military assistance to El Salvador. The United States and El Salvador did not participate in the proceeding. The ICJ

---

78 1986 I.C.J. 14 (June 27).
79 Id. ¶ 23, 93.
80 The United States did not participate in the proceeding because it contested the Court’s jurisdiction to assess the legality of its use of force under customary international law; the United States argued it was assisting in El Salvador’s defense against Nicaraguan-sponsored communist insurgents, the sandanistas. The ICJ rejected the United States’ claim that it lacked jurisdiction. See, e.g., id. ¶ 187 (presenting the U.S. position that the Court may not apply customary international law when it is identical to treaty provisions for which it has issued a reservation that disallows ICJ jurisdiction); id. ¶ 188 (presenting the U.S. assertion that the laws governing the use of force exist under customary international law due to fulfillment of the conditions of *opinio juris*); id. ¶ 46 (rejecting the 1984 U.S. argument that the ICJ lacks jurisdiction based on its treaty reservation); id. ¶ 292(1) (holding that the ICJ has jurisdiction to hear the dispute notwithstanding the U.S. reservation against ICJ jurisdiction on matters pertaining to multilateral treaty reservations); see generally Monroe Leigh, *International Court of Justice—Multilateral Treaty Reservation—Use of Force—Non-intervention—Collective Self-Defense—Justiciability*, 81 AM. J. INT’L L. 206, 206 (1987) (noting that the United States, after losing its jurisdictional challenge, “withdrew from further participation in the case and subsequently withdrew its acceptance of the compulsory jurisdiction of the Court”). The Court denied El Salvador’s request to intervene on behalf of the United States, and El Salvador subsequently refrained from pursuing further intervention. See *Nicar. v. U.S.*, 1986 I.C.J. 14 ¶¶ 109–112 (Schwebel, J., dissenting) (criticizing the Court for its handling of El Salvador’s intervention request). Judge Schwebel noted that the proceedings rejecting El Salvador’s intervention request “have been the subject of extensive analysis by an authority on the Court’s procedures . . . [who concluded:] ‘the Court’s decision might reinforce the suspicion — noticeable in other aspects of the Nicaragua
concluded that the United States acted illegally by providing military assistance to El Salvador to repel a Communist insurgency sponsored by Nicaragua.81

The ICJ, in reaching its holding, concluded that the United States engaged in covert operations against Nicaragua, which included mining Nicaraguan ports, attacking ports and port facilities, and supporting contra rebel forces.82 The record revealed war crimes were committed by both Communist sandanistas and anti-Communist contras.83 The ICJ concluded, however, that the United States exercised insufficient command and control over the contras to justify U.S. liability for the contras’ violations of human rights.84

81 See Nicar. v. U.S., 1986 I.C.J. ¶ 228 (holding that the United States had merely supplied funds to insurgents, which was “undoubtedly an act of intervention in the internal affairs of Nicaragua . . . [but] does not in itself amount to a use of force”); see also ¶ 292(2)-(8); id. ¶ 232 (holding that a right to self-defense vests only after a victim state has suffered from an armed attack and declared itself as the victim of such an armed attack).

82 Id. ¶¶ 237, 253 (holding that the United States had mined harbors and attacked ports); id. ¶¶ 93-122 (finding that the United States supported contra rebel forces); see also Harry H. Almond, Jr., The Military Activities Case: New Perspectives on the International Court of Justice and Global Public Order, 21 INT’L LAW. 195, 195 (1987) (detailing the United States’s offenses against Nicaragua).

83 See Nicar. v. U.S., 1986 I.C.J. 14 ¶ 206 (Schwebel, J., dissenting) (factual appendix) (“There is substantial—and horrifying—evidence in the record, and in the public domain, of violations of the law of war in the Nicaraguan struggle, particularly by the contras based in Honduras and, apparently to a lesser extent, by the Nicaraguan Government.”). Schwebel also asserts:

It should be added that, if the United States were to be held, as Nicaragua maintains that it should be held, responsible for the atrocities of the contras, then it would appear, by parity of reasoning, that Nicaragua should be held responsible for the atrocities of the [Nicaraguan Sandinista-sponsored] Salvadoran insurgents.

. . .

[I]t would follow that Nicaragua is no more – but no less – responsible for the violations of the law of war by the Salvadoran insurgents than is the United States responsible for the violations of the law of war by the contras . . . . In any case, the responsibility or lack of responsibility of one government or collection of insurgent authorities for violations of the law of war cannot excuse the responsibility of another for its violations.

Id. ¶ 224 (Schwebel, J., dissenting) (factual appendix).

84 Id. ¶¶ 109-111 (holding that although the contras were dependent on U.S. aid, the United States did not exercise a degree of control over the contras sufficient to conclude that the contras were acting on its behalf).
The ICJ evaluated the 1974 United Nations (U.N.) General Assembly Resolution on the Definition of Aggression, Article 3(g).\textsuperscript{85} The U.N. Resolution, Article 3(g), defines as aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."\textsuperscript{86} The ICJ concluded that Article 3(g), "may be taken to reflect customary international law."\textsuperscript{87} The ICJ held that customary international law prohibited a state from sending out armed bands into the territory of another state if such an attack was of a scale, and had effects, that would render it to be illegal aggression if carried out by regular armed forces.\textsuperscript{88} The ICJ, however, held an "armed attack" did not occur if a state merely provided assistance to rebels by providing weapons or logistical or other support.\textsuperscript{89}

As to command and control, the ICJ evaluated U.S. links to contra activities. As noted, it concluded the United States had funded contra activities.\textsuperscript{90} In addition, the United States was deemed responsible for the distribution of a military manual that violated humanitarian law.\textsuperscript{91} The manual was allegedly written by a "'low-level contract employee' of the CIA."\textsuperscript{92} This manual discouraged indiscriminate violence against civilians, but considered the possible necessity of shooting civilians, "neutralizing" government officials, and hiring criminals to provoke authorities to use violence.\textsuperscript{93} The manual's recommendations violated Common Article 3 of the Geneva Conventions (I-IV), which prohibits sentences and executions that are not

\textsuperscript{85} Id. ¶ 195.
\textsuperscript{88} Id.
\textsuperscript{89} Id. Justice Schwebel, an American, strongly rejected this view. See id. ¶¶ 154-161 (Schwebel, J., dissenting) (asserting that the Nicaraguan government's act of materially supporting insurgency in El Salvador is tantamount to an armed attack against El Salvador); id. ¶ 157 (Schwebel, J., dissenting) ("The consistent practice of the United Nations confirms the proposition that substantial involvement in the activities of armed insurgent groups is a violation of the prohibition on the use of force in [U.N. Charter] Article 2(4))" (emphasis removed); id. ¶ 161 (Schwebel, J., dissenting) (asserting that the Court's position is inconsistent with several authoritative sources); see generally STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 140-45 (1994) (discussing Nicaragua v. United States).
\textsuperscript{91} Id. ¶ 255.
\textsuperscript{92} Id. ¶ 120.
\textsuperscript{93} Id. ¶ 122.
conducted by proper courts and that do not afford judicial guarantees.\textsuperscript{94} The ICJ held that the United States was responsible for supplying this manual to contra guerrilla forces, but since the United States never had operational command over the contras, their war crimes were not imputable to the United States.\textsuperscript{95}

\textbf{B. Prosecutor v. Tadic}

In 1999, the International Criminal Tribunal for the Former Yugoslavia’s Appeals Chamber (Tribunal) issued its ruling in \textit{Prosecutor v. Tadic}.\textsuperscript{96} Dusko Tadic was convicted of war crimes in the former Yugoslavia.\textsuperscript{97} The Tribunal addressed whether armed fighting in a prima facie internal armed conflict may be regarded as acting on behalf of a foreign state.\textsuperscript{98} The Tribunal identified a state practice accepting a belligerent state’s use of paramilitary and irregular forces when the belligerents take responsibility for “any infringements committed by such forces.”\textsuperscript{99} The Tribunal concluded that in order for irregulars to qualify as lawful combatants, a belligerent state must have effective control over them.\textsuperscript{100} As a result, in order for the state to bear criminal responsibility for the group’s war crimes, the state must have “some measure of control . . . over the perpetrators.”\textsuperscript{101} The Tribunal noted international humanitarian law lacked criteria to establish when a group was

\textsuperscript{94} \textit{Id.} \textsuperscript{218} (asserting that Article 3 provisions apply to the United States because they are a “minimum yardstick,” regardless of any U.S. treaty reservations); \textit{id.} \textsuperscript{255} (noting that a state likely cannot be held responsible for actions it incites another state to commit); \textit{see also} Captain Daniel Smith, \textit{New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States}, 120 MIL. L. REV. 59, 63-65 (1988). Smith notes that Common Article 3 prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” \textit{Id.} at 64 (quoting Common Article 3). These provisions apply “at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed in hors de combat by sickness, wounds, detention, or any other cause].” \textit{Id.} at 64 (quoting Common Article 3).

\textsuperscript{95} \textit{Nicar. v. U.S.}, 1986 I.C.J. 14 \textsuperscript{122}, 292(9).

\textsuperscript{96} Case No. IT-94-1-A, Appeal of Judgment (July 15, 1999).

\textsuperscript{97} \textit{Id.} \textsuperscript{2}.

\textsuperscript{98} \textit{Id.} \textsuperscript{81}.

\textsuperscript{99} \textit{Id.} \textsuperscript{94}.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.} \textsuperscript{96}.
under the control of a state, and the Tribunal was therefore compelled to evaluate state practice.\footnote{102}

The Tribunal concluded state practice was at variance with the ICJ’s \textit{Nicaragua} ruling.\footnote{103} The Tribunal noted that under \textit{Nicaragua}, states that used military or paramilitary groups for covert operations are liable for the operatives’ war crimes only when the state exercised “effective control”\footnote{104} over the group, extending to “the issuance of specific instructions concerning the various activities of the individuals in question.”\footnote{105}

The Tribunal analyzed when states could be held liable for the war crimes of military and paramilitary forces and concluded that state practice revealed as follows: where states utilized organized military groups, “it is not sufficient for the group to be financially or even militarily assisted by a State.”\footnote{106} Thus, “it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”\footnote{107} Only when these conditions are satisfied “can the State be held internationally accountable for any misconduct of the group.”\footnote{108} However, as to a state’s liability for war crimes committed by an organized group, the state need not have issued “instructions for the commission of specific acts contrary to international law.”\footnote{109}

State practice, however, revealed courts had taken a different approach when analyzing a state’s use of unorganized military groups.\footnote{110} A state that had “an overall or general level of control” over an unorganized group would not be liable for the group’s war crimes unless the state had either issued “specific instructions or directives aimed at the commission of specific acts,” or subsequently issued public approval of the acts.\footnote{111}

\footnote{102} See id. ¶ 99, 116-145.\
\footnote{103} Id. ¶ 124.\
\footnote{104} Id.\
\footnote{105} Id. ¶ 125.\
\footnote{106} Id. ¶ 130. An organized group is characterized by a hierarchical structure, a chain of command, a set of rules, and outward symbols of authority. Id. ¶ 120. Its members are subject to the group’s prevailing standards and the authority of the group’s leadership. Id. Members may wear distinctive symbols that affiliate them with a government. See id. ¶ 127. In contrast, an unorganized group lacks a military structure. See id. ¶¶ 132, 137.\
\footnote{107} Id. ¶ 131.\
\footnote{108} Id.\
\footnote{109} Id.\
\footnote{110} Id. ¶ 132.\
\footnote{111} Id.
Thus, under Tadic's assessment of state practice, a state is liable for organized operatives' war crimes when the state controls the group militarily, but it need not have issued orders for war crimes.\(^\text{112}\) In contrast, a state is liable for unorganized operatives' war crimes only if it ordered or endorsed the illegal conduct.\(^\text{113}\)

IV. THE JUST WAR DOCTRINE, INTERNATIONAL LAW, AND STATE LIABILITY FOR WAR CRIMES

A. State Control of Operatives and War Crimes Liability

Under Nicaragua, a state is liable for the war crimes of its paramilitary groups when it has command and control of the group. This comports with the Just War doctrine, which predicates the lawfulness of war on the ability of the state and individual soldier to accept the obligation to use force, but to use it subject to moral constraints. In contrast, under Tadic's depiction of state practice, a state that controls an organized group is liable for the group's war crimes, regardless of whether it ordered or endorsed the criminal action; however, the state could have comparable control over an unorganized group, but it is only liable for the group's war crimes if the state ordered the criminal action or subsequently endorsed it. This inconsistency is flawed under the Just War doctrine and its parallels in international law. Together, they establish that a state is liable for the war crimes committed by a paramilitary group it controls, regardless of whether the group is organized or unorganized and regardless of whether the state ordered or endorsed the group's conduct.

B. The Just War Doctrine: Objections and Responses

Catholic, Protestant, and secular scholars continue to advance the Just War doctrine as a framework for dealing with problems of conflict management.\(^\text{114}\)

\(^{112}\) Id. ¶ 137.

\(^{113}\) Id.

\(^{114}\) See OXFORD, supra note 3, at 361 (noting also that some Christians follow the early tradition of pacifism); Little, in MOORE ET AL., supra note 3, at 57. The pacifist view is often represented by the Society of Friends, also known as Quakers. See, e.g., LEO ROSTEN, RELIGIONS OF AMERICA: FERMENT AND FAITH IN AN AGE OF CRISIS, A NEW GUIDE AND ALMANAC 229 (1975) (recognizing many members of the Society of Friends embrace the pacifist tradition, though "[s]ome Quakers have given up their pacifism and gone to war"). In 1661, the Friends stated to Charles II:
Some scholars dismiss the Just War doctrine as irrelevant to modern conflict. We utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretense whatsoever. The spirit of Christ, which leads us into all Truth, will never move us to fight and war against any man with outward weapons, neither for the kingdom of Christ nor for the kingdoms of this world.

*Id.* For a survey of various Christian views on war, see generally *Webster & Cole,* supra note 6, at 54-121 (discussing Orthodox Christianity’s views on the Just War doctrine); *id.* at 122-50 (discussing traditional Roman Catholic views on the Just War doctrine); *id.* at 151-68 (discussing the Protestant Reformers and their view of the Just War doctrine); *id.* at 169-91 (criticizing Christian arguments for pacifism). For the Catholic perspective, see *Catechism of the Catholic Church,* supra note 19, at 556, § 2309 (establishing the precepts of just war); see also Johnson, *supra* note 30, at 19-20 (contrasting the Catholic pacifist or “peace tradition” with the Just War tradition). Johnson asserts that the Catholic pacifist tradition is at odds with the Just War tradition. Johnson, *supra* note 30, at 18. He asserts the just war tradition does not provide a presumption against war. *Id.* at 20. He notes that the Catechism recognizes:

> Peace is not merely the absence of war, and it is not limited to maintaining a balance of powers between adversaries. Peace cannot be attained on earth without safeguarding the goods of persons, free communication among men, respect for the dignity of persons and peoples, and the assiduous practice of fraternity.

*Id.* (quoting *Catechism of the Catholic Church,* supra note 19, at 555, § 2304). For an evangelical Protestant perspective, see, e.g., W.H. Griffith Thomas, D.D., *The Principles of Theology: An Introduction to the Thirty-Nine Articles* 461 (Vine Books Ltd. 1978) (1930). Thomas comments on the Church of England’s Articles of Religion, Article 37, which establishes *Christianis licet, ex mandato Magistratus, arma poreare, et justa bella administrare* (It is lawful for Christian men, at the commandment of the Magistrate, to wear weapons, and serve in wars). *Id.* Thomas was an evangelical Anglican who wrote after World War I, and his book is illustrative of evangelical scholarship. See *Grudem,* supra note 1, at 1229 (“Although [Thomas’] book is structured around the Anglican Thirty-Nine Articles, it functions well as a thoughtful introductory text in Christian doctrine even for those outside the Anglican tradition. It has been widely used in British evangelical circles for many years.”). The Westminster Confession of Faith, a Calvinist statement of doctrine from 1643-46, establishes the same position as the Church of England’s Article 37. It states:

Ch. 23: Of the Civil Magistrate

1. God, the supreme Lord and King of all the world, hath ordained civil magistrates, to be, under him, over the people, for his own glory, and the public good: and, to this end, hath armed them with the power of the sword, for the defense and encouragement of them that are good, for the punishment of evil doers.

2. It is lawful for Christians to accept and execute the office of a magistrate, when called thereunto: in the managing whereof, as they ought especially to maintain piety, justice, and peace, according to the wholesome laws of each commonwealth; so for that end, *they may lawfully, now under the New Testament, wage war, upon just and necessary occasion.*

*Grudem,* supra note 1, at 1191 (emphasis added).
management because conflict management is now governed by the U.N. Charter, not a monolithic medieval Church with authority over states, or because the Just War doctrine lacks objective criteria for assessing whether a war is just or unjust.\textsuperscript{115}

Admittedly, these are limitations, but they prove too much when offered to establish that the doctrine should have no influence in modern conflict management. First, to dismiss the Just War doctrine because it lacks a monolithic entity to objectively enforce its precepts would, by parity of reasoning, dismiss international law itself, since it too, in the eyes of its critics, lacks a monolithic and objective entity to establish and enforce its rules.\textsuperscript{116} The post-Nuremberg consensus establishes that humanitarian precepts are central to the lawful use of force, notwithstanding state sovereignty.\textsuperscript{117} As will be shown, the Just War doctrine encapsulates these precepts. Second, the Just War doctrine is comprised of tenets that have parallels in conventional and customary international law. Together, they establish that states bear liability for the actions of either an organized or unorganized group they control, regardless of whether the state issues specific orders for its criminal activities.

\textsuperscript{115} See Little, in MOORE ET AL., \textit{supra} note 3, at 56-57. These criticisms echo Austinian positivism. See generally DINSTEIN, \textit{supra} note 25, at 63:

\begin{quote}
In the nineteenth (and early part of the twentieth) century, the attempt to differentiate between just and unjust wars in positive international law was discredited and abandoned. States continued to use the rhetoric of justice when they went to war, but the justification produced no legal reverberations. Most international lawyers conceded openly that ‘[w]ith the inherent rightfulness of war international law has nothing to do.’ Or, in the acerbic words of T. J. Lawrence, distinctions between just and unjust causes of war ‘belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status.’
\end{quote}

(citations omitted).

\textsuperscript{116} For an illustration of post-World War II positivist skepticism about international law, see H.L.A. HART, THE CONCEPT OF LAW 214 (1961) (noting that international “law” inspires misgivings because it is not derived from an international legislature, lacks courts with compulsory jurisdiction, lacks centrally organized sanctions, lacks rules of change that provide for courts and adjudication, and lacks a rule of recognition that specifies the sources of law and provides criteria to identify its rules). For a discussion of the U.N. and its inability to act as a sovereign, see Johnson, \textit{supra} note 30, at 22-23 (asserting that because the U.N. is not a sovereign, it cannot have a \textit{jus ad bellum}, a just cause to use force, under the traditional Just War doctrine). Johnson also notes, “international organization has not superseded the state; for it to function well, it must depend on states that function well.” Johnson, \textit{supra} note 30, at 22.

\textsuperscript{117} See JANIS, \textit{supra} note 3, at 253-57.
C. The Just War Doctrine and War Crimes Liability

The precepts of the modern Just War doctrine can be summarized as follows: (1) Conditions that cause war should be eliminated; (2) There is an affirmative obligation to avoid war and exhaust peaceful means of resolving conflict; (3) States may use force to protect the innocent; (4) States may use force in self-defense; (5) Humane treatment must be extended to non-combatants, wounded soldiers, and prisoners; and (6) Indiscriminate destruction is prohibited. These points reveal that current state practice, as identified by Tadic, is flawed in holding a state liable for war crimes committed by its unorganized paramilitary group only if the state ordered or endorsed the criminal action.

1. Conditions that Cause War Should Be Eliminated; and

2. There is an Affirmative Obligation to Avoid War and Exhaust Peaceful Means of Resolving Conflict

The first precept of the Just War doctrine is normative: the causes of war should be eliminated. Catholic doctrine counsels against injustice, economic and social inequality, envy, distrust, and pride among nations, all as causes of war. Protestant doctrine counsels against envy, hatred, malice, and revenge amongst nations. Similarly, the U.N. Charter states that the U.N. has been established to prevent and remove threats to peace, suppress aggression, develop friendly relations among nations, achieve international cooperation in solving economic, social, cultural, and humanitarian problems, and to encourage respect for human rights and fundamental freedoms.

The Just War doctrine also establishes an affirmative obligation to avoid war and exhaust peaceful means of resolving conflict. Catholic doctrine establishes that citizens and governments must seek to avoid war and exhaust peaceful mechanisms to resolve disputes. Protestant doctrine establishes

118 See CATECHISM OF THE CATHOLIC CHURCH, supra note 19, at 556-57, §§ 2309-2317; THOMAS, supra note 114, at 475-79.
119 See CATECHISM OF THE CATHOLIC CHURCH, supra note 19, at 557, §§ 2314-2317.
120 See THOMAS, supra note 114, at 476 ("[E]nvy, hatred, and malice are absolutely wrong in nations as they are in individuals, and so is revenge.").
121 See U.N. Charter art. 1(1)-(4).
122 See CATECHISM OF THE CATHOLIC CHURCH, supra note 19, at 555, § 2308 ("All citizens and all governments are obliged to work for the avoidance of war."); id. at 556, § 2309 ("[A]ll other means of putting an end to... [conflict] must have been shown to be impractical or
war "is justifiable when the resources of peace are really exhausted and the enemy still refuses to lay aside his tyranny and hatred." Similarly, the U.N. Charter states that the U.N. has been established to suppress aggression and other breaches of peace, and to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Suppose that state A controls an unorganized group that commits war crimes in state B, which state A neither ordered nor endorsed. It is axiomatic that state B will perceive state A as a threat to its security interests. Tadic's depiction of state practice establishes state B has no grounds to attribute the group's conduct to state A, and thus state A bears no responsibility for the group's conduct. State B may attempt a diplomatic solution, but if this fails, it is difficult to see how state A's ability to escape liability for the group's conduct will incline state B to refrain from using force.

3. States May Use Force to Protect the Innocent

The Just War doctrine also establishes that states may use force to protect the innocent, and in fact, they have an obligation to do so. Catholic doctrine suggests that individuals who are responsible for the lives of others have not only a right but a "grave duty" to engage in their legitimate defense.
Protestant doctrine establishes that Christians have a duty to resist evil, that yielding to evil implies sinful compliance, that a Christian must accept personal injury but has a duty to protect others, and thus, "the Christian attitude to those who are aggressively brutal and unjust must be one of opposition and resistance in the highest interests of the community."  

Traditionally, international law imposed no direct obligation on states to protect another state's citizens. However, U.N. analysts now assert that the international community has an obligation to act against genocide and other large-scale atrocities since they are threats to international peace and armed force in the pursuit of peace, security, and order."  

127 THOMAS, supra note 114, at 477. It seems clear that the Just War doctrine's impetus to fight against evil is subject to biased interpretation. For example, a Puritan catechism from the English Revolution indicates Cromwell's soldiers were instructed they were fighting the Antichrist. See THE SOULDIER'S CATECHISME (Cresset Press Ltd., facsimile reprint 1936) (1644). It states:  

Q. Is it lawful for Christians to be soldiers?  
A. Yes doubtlesse: we have Arguments enough to warrant it.... God calls himself a man of war, and Lord of Hosts.  

Id. at 1.  

Q. What say you then of those Protestants, which fight on the other side, and joyne with the Enemies of our Religion, Parliament, and Country?  
A. 1. I say, that they are unworthy the name of Protestants.  
2. I say, that they maintain the cause of Antichrist.  
3. That they are the shame and blemishes of Religion.  
4. That none of their weapons shall prosper.  

Id. at 7. It seems equally clear, however, that the Just War doctrine may legitimately counsel Christians to endure wars necessary to defeat evil. On the eve of World War II, C.S. Lewis, who had served in World War I, stated, "And of course war is a very great evil. But that is not the question. The question is whether war is the greatest evil in the world, so that any state of affairs which might result from submission is certainly preferable." LEWIS, supra note 6, at 78. Later in World War II, the London Times published the letter of a Royal Air Force pilot who wrote to his mother before being killed in the Battle of Britain. It states:  

To-day we are faced with the greatest organized challenge to Christianity and civilization that the world has ever seen, and I count myself lucky and honoured to be the right age and fully trained to throw my full weight into the scale.  

...  

I firmly and absolutely believe that evil things are sent into the world to try us; they are sent deliberately by our Creator to test our mettle because He knows what is good for us. The Bible is full of cases where the easy way out has been discarded for moral principles.  

Letter (June 1940), in AN AIRMAN'S LETTER TO HIS MOTHER 18-20 (E.P. Dutton & Co., Inc. 1940).
Some scholars argue that U.N. Charter Article 2(4) authorizes states to use force in humanitarian intervention without Security Council authorization.\textsuperscript{129}

Suppose state $A$ controls an unorganized group, and does not order or endorse its criminal actions. Suppose the group, which operates primarily out of state $A$, commits sufficiently egregious war crimes in state $B$ to create a humanitarian crisis. Under the Just War doctrine and international law, state $C$ has a right to use force necessary to protect the innocent lives at risk in state $B$, which could extend to a right to use force against the unorganized group in state $A$. Thus, state $C$ has a right to use force against state $A$. Under Tadic's depiction of state practice, state $A$ bears no responsibility for the actions of the unorganized group that gave rise to state $C$'s right to use force. Again, this is problematic because under the Just War doctrine and international law, state


\textsuperscript{129} See U.N. Charter art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); see also A.P.V. Rogers, \textit{Humanitarian Intervention and International Law}, 27 HARV. J. L. & PUB. POL'Y 725, 736 (2004) (asserting that humanitarian intervention remains controversial but certain rules restrict its usage). Rogers summarizes the rules restricting humanitarian intervention as follows:

1. There must be the existence, or imminence, of a serious humanitarian situation—variously described as an overwhelming humanitarian catastrophe/gross and egregious human rights violations/an exceptional and most serious situation of emergency.
2. The territorial state must fail to deal with the situation.
3. The Security Council must fail to deal with the situation.
4. Use of force is the last resort/the only practicable solution and peaceful solutions have been exhausted.
5. Action must be collective.
6. The purpose of the action must be limited to dealing with the humanitarian situation and those intervening must be disinterested.
7. There must be a realistic prospect of achieving the desired result.
8. The action must be reported to the Security Council.
9. The action must be proportionate; it must not cause more harm than the harm to be alleviated.
10. Any use of force must comply with international humanitarian law.

\textit{Id.} at 736. For a criticism of the use of the Just War doctrine as a basis for humanitarian intervention without Security Council authorization, see Dinstein, \textit{supra} note 43, at 881 (arguing that humanitarian intervention is prohibited by the U.N. Charter unless authorized by the Security Council).
C has a right to use force against a state which, under Tadic's depiction of state practice, bears no liability for the actions which create state C's right to use force.

4. States May Use Force in Self-defense

The Just War doctrine establishes that states may use force in self-defense. Catholic doctrine evinces that states have a right to self-defense when no international authority has the competence to spare them from the dangers of war, and peaceful efforts have been exhausted. Protestant doctrine establishes that Christians may "take up arms in defence of the country." The morality of waging war in self-defense derives from the morality of waging war to protect the innocent: a sovereign may wage war to protect innocent civilians of another state, or of the sovereign's state.

Similarly, the U.N. Charter establishes that states have an inherent right to individual and collective self-defense in the face of, in the English translation, an "armed attack." In the French translation, the right to self-defense exists in the face of "agression armee" (armed aggression). A state must report to the Security Council if it takes measures in self-defense. Daniel Webster

---

130 See CATECHISM OF THE CATHOLIC CHURCH, supra note 19, at 556, § 2308 ("[A]s long as the danger of war persists and there is no international authority with the necessary competence and power, governments cannot be denied the right of lawful self-defense, once all peace efforts have failed."). The Catechism evinces that the threshold for this action is high. See id. at 556, § 2309:

[T]he damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain; there must be serious prospects of success; the use of arms must not produce evil and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.

131 THOMAS, supra note 114, at 477.

132 See Johnson, supra note 30, at 20.

133 U.N. Charter art. 51 (noting that the Charter does not "impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security").

134 See MOORE ET AL., supra note 3, at 87-88 (noting that the French translation differs from the English translation); John Norton Moore, The Secret War in Central America and the Future of World Order, 80 Am. J. Int'l L. 43, 83 (1986) (suggesting that the French translation, granting a right to self-defense in the face of armed aggression, evinces that the Charter does not require that a direct armed attack occur before a state may use force in self-defense).

135 See U.N. Charter art. 51.
stated the customary doctrine of self-defense in the Caroline case; it establishes that measures taken in self-defense are legally justified when necessary and proportional. Additionally, international law prohibits perfidious acts. The rules against perfidy prevent states from feigning neutrality and using paramilitary groups without notice to the other party.

Suppose state A controls an unorganized group, which it encourages to secretly strike a military target in state B. State A maintains it is a neutral, non-belligerent party as to state B. The group invades state B and instead of striking a military target, kills a large number of state B's civilians. Under Tadic's depiction of state practice, the group's actions are not attributable to state A, yet under the Just War doctrine and international law, state B has a right to self-defense against state A, and state A is doubly liable, both for sponsoring an armed attack or act of aggression against state B, and for doing so perfidiously while declaring its status as a neutral.

[136] See INTERNATIONAL LAW AND WORLD ORDER 420 n.14 (Burns H. Weston et al. eds., 1997) ("It has long been accepted under traditional international law that self-defense is justified only when the necessity for action is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation.' . . . [I]t gives content to the principle of military necessity," (quoting Daniel Webster) (citations omitted)). In Nicaragua, the ICJ concluded that the U.N. Charter's rules governing the use of force had displaced prior approaches under customary international law. See Nicar. v. U.S., 1986 I.C.J. 46, 187-188, 292(1).


It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.

[138] See id. art. 37(1)(d) ("The following acts are examples of perfidy . . . the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict."); id. art. 39(1) ("It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict."); id. art. 43(3) ("Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.").
5. Humane Treatment Must Be Extended to Non-combatants, Wounded Soldiers, and Prisoners; and
6. Indiscriminate Destruction Is Prohibited

The Just War doctrine requires that humane treatment be extended to non-combatants, wounded soldiers, and prisoners. Catholic doctrine states this, and also states it is criminal to act deliberately against the law of nations and to issue or follow unlawful orders, especially orders to effect the extermination of a people, nation, or ethnic minority.\textsuperscript{139} Additionally, Catholic doctrine establishes that "Every act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man, which merits firm and unequivocal condemnation."\textsuperscript{140} Protestant doctrine establishes it is wrong to use force in a manner that is unnecessary or cruel.\textsuperscript{141}

Conventional and customary international law has long protected noncombatants, wounded and surrendering military personnel, and prisoners of war; states have also prohibited indiscriminate attacks that lack a legitimate military objective or target civilians, and weapons that cause unnecessary suffering.\textsuperscript{142} Genocide is proscribed by convention and universally condemned

\textsuperscript{139} See CATECHISM OF THE CATHOLIC CHURCH, supra note 19, at 557, § 2313: Actions deliberately contrary to the law of nations and to its universal principles are crimes, as are the orders that command such actions. Blind obedience does not suffice to excuse those who carry them out. Thus the extermination of a people, nation, or ethnic minority must be condemned as a mortal sin. One is morally bound to resist orders that command genocide.

\textsuperscript{140} Id. at 557, § 2314 (quoting Gaudium et spes 80, § 3).

\textsuperscript{141} See THOMAS, supra note 114, at 478 (asserting that only the unnecessary or cruel employment of force is wrong).

\textsuperscript{142} See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Times of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287: Protected persons . . . shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Convention Respecting the Laws and Customs of War on Land, Hague Convention IV art. 4, Oct. 18, 1907, 36 Stat. 2277 ("Prisoners of war . . . must be humanely treated."); see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3(1), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely."); Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of war must at all
as a non-derogable norm of jus cogens.\textsuperscript{143} Jus cogens norms are mandatory rules of international law that bind states and are not subject to exemption.\textsuperscript{144}

These precepts are the central precepts of the Just War doctrine's formation of jus in bello, rules to govern a soldier's conduct in war; unsurprisingly, they are the basis on which Grotius formulated international law after assessing the brutality of war.\textsuperscript{145} Military scholars have chronicled the excesses and abuses soldiers have visited upon enemy soldiers and civilian populations.\textsuperscript{146} As


\textsuperscript{144} Jus cogens is defined as, "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACK'S LAW DICTIONARY 356 (pocket ed. 1996).

\textsuperscript{145} Several scholars have chronicled the soldier's abuses and reputation throughout history. For an example, see M. Keen, The Law of War in the Late Middle Ages, in MOORE ET AL., supra note 3, at 307:

In a city taken by storm almost any license was condoned by the law. Only churches and churchmen were technically secure, but even they were not often spared. Women could be raped, and men killed out of hand. All the goods of the inhabitants were regarded as forfeit. If lives were spared, it was
Telford Taylor notes, war consists of violent acts that would generally be regarded as illegal but for the blanket of immunity that allows such acts to occur in war. The immunity is limited and "is prescribed by the laws of war." The lawful combatant has a limited privilege to commit violence within the confines of the laws of war. Thus:

The combatants' privilege is reserved to the members of the armed forces of a party to an international armed conflict who have not forfeited their right to be combatants by failing to distinguish themselves from the civilian population while engaged in hostile military operations and to those irregular combatants (guerrillas) who conform to the standards prescribed for entitlement to privileged-combatant and prisoner-of-war status. Those who are caught as spies or who otherwise take a direct part in hostilities without qualifying as combatants do not enjoy the privilege.

Suppose state A controls an unorganized group, but does not issue it orders to commit war crimes. The group violates international law by, for example, torturing prisoners of war from state B, targeting state B's civilians, or attempting genocide on state B's residents. Tadic's depiction of state practice suggests that although the group's acts are squarely outside of the combatant's privilege to use violence against an enemy, state A bears no liability for the

only through the clemency of the victorious captain; and spoliation was systematic. The prospect of this free run of his lusts for blood, spoil and women was a major incentive to a soldier to persevere in the rigours which were likely to attend a protracted siege.

John Keegan notes that society's admiration for military service is a relatively recent development. See Keegan, supra note 3, at 48 ("The Roman soldiers of the New Testament — men under authority, as Christ’s dialogue with the centurion reminds us — supplied not merely his torturers and executioners but... they were blackmailers and robbers as well."); id. at xii (asserting that historically, the image of the honorable soldier has been "outnumbered by the brutish rank-and-file, the conscript dolt, the mercenary, the free-booting predator of the cavalry horde or the raiding longship"); id. at 49 (noting that soldiers were hated and despised figures in the medieval and renaissance eras, and that "]E]ven in Victorian Britain, which tolerated no civil misbehavior by Tommy Atkins [a colloquial term for a British soldier], the common soldier was a social outcast").


148 Id.

149 Id.
group's actions, and thus, state B has no legal claim against state A. Paradoxically, under the Just War doctrine and international law, state B has a right to use force against state A.  

V. CONCLUSION

War may have got worse with the passage of time, but the ethic of restraint has rarely been wholly absent from its practice. We know, of course, of episodes in which the victors killed without mercy. We know equally that even in the age of total warfare, there remain taboos, enshrined in law and thankfully widely observed, against killing the defenceless, women, children, the old, the sick and wounded, and those who care for them. I cannot believe that these inhibitions do not have very deep roots in human nature. . . .

The soldier Christ praised for his faith said he was a man under authority; he knew he had the power to issue orders that would be followed. The Just War doctrine was developed largely by theologians who aspired to see a hand of authority guide states and soldiers at war. Its precepts mirror the development of parallel international legal obligations. This suggests that the Just War doctrine is not an anachronism; it is instead the foundation from which laws of armed conflict derive. To a large extent, the Just War doctrine authorizes and prohibits the same conduct as the existing laws governing armed conflict. Insofar as state practice suggests that a state bears no liability for the war crimes committed by an unorganized group it controls when it has not ordered or endorsed the criminal conduct, this practice is at odds with the Just War doctrine, the U.N. Charter, and a series of Hague and Geneva Conventions.

---

150 Additionally, since the prohibition on genocide is jus cogens, any state would be justified in taking measures to stop the unorganized group from committing genocide, and although state A controls the group, it bears no responsibility for its genocide.

151 KEEGAN, supra note 3, at 26.

152 See supra note 5.